IN THE SUPREME COURT OF IOWA

NO. 07-0743

RENEWABLE FUELS, INC.,
DONALD JAMES McCRABB,
DAVID McCRABB, and
NORMAN NICOL,

Petitioners-Appellants,

v.

IOWA INSURANCE COMMISSIONER
and the INSURANCE DIVISION OF THE
IOWA DEPARTMENT OF COMMERCE,

Respondents-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE ROBERT A. HUTCHISON, JUDGE

RESPONDENTS-APPELLEES' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

I, Jeanie Kunkle Vaudt, do affirm that I or someone acting on my behalf did timely serve Appellees' Final Brief and Request for Oral Argument on all other parties to this appeal by mailing two (2) copies thereof to the respective counsel for said parties by depositing same in the United States mail, first-class postage prepaid, on this 26th day of October, 2007:

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CERTIFICATE OF FILING

I, Jeanie Kunkle Vaudt, do affirm that I or someone acting on my behalf did file Respondents-Appellees' Final Brief and Request for Oral Argument on the 26th day of October, 2007, by hand-delivering eighteen (18) copies thereof to the Clerk of the Iowa Supreme Court, Iowa Judicial Branch Building, 1111 Court Avenue, Des Moines, Iowa 50319.

Jeanie Kunkle Vaudt
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Authorities

Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11 (Iowa 2007)

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STATEMENT OF THE CASE

Nature of the Case. This is an appeal from the district court's affirmance on judicial review of a final procedural order by respondent-appellee Iowa insurance commissioner Susan E. Voss (the commissioner). The order (1) denied petitioners-appellants Renewable Fuels, Inc., Donald James McCrabb, David McCrabb, and Norman Nicol (collectively, RFI) motion to dismiss a contested case hearing with prejudice and vacate the cease and desist order underpinning it, and (2) granted the Iowa insurance division's (the division) motion to dismiss the hearing without prejudice. RFI now seeks appellate review of the district court's affirmance.

Statement of Facts and Course of Proceedings. The division issued RFI the cease and desist order on May 2, 2005 under Iowa Code section 502.604 (2003) as amended by 2004 Iowa Acts ch. 1161, § 68[1] for offering and selling unregistered and non-exempt securities without a license and for omitting material facts related to said sales. (App. at 1-8.) RFI mailed the division a letter request for a contested case hearing on the cease and desist order on June 1, 2005. (App. at 35.) The division received the request on June 2, 2005.

Iowa Code section 502.604(2) provides that within fifteen days after receiving such a request, the hearing will be scheduled. Fifteen days after June 2, 2005 was June 18, 2005.

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[1] All subsequent brief references will be to the 2003 Iowa Code as amended by the 2004 Iowa Acts unless otherwise indicated, but will be abbreviated to just the relevant section citation for ease of reading.

The division sent RFI's request to the Iowa department of inspections and appeals (DIA) on June 27, 2005. (App. at 53.) DIA notified the parties on July 15, 2005 that it had scheduled the hearing on RFI's request for September 14, 2005. (App. at 9.)

On August 3, 2005, RFI filed a motion to dismiss, requesting dismissal with prejudice and asking for vacation of the underlying cease and desist order. (App. at 17-19.) The motion was premised upon the division's transmittal of the scheduling request approximately a week-and-a-half beyond the fifteen-day time frame articulated by section 502.604(2). (App. at 17-18.)

The division filed a resistance and cross motion to dismiss the contested case hearing, asserting that RFI's hearing request was untimely because it was not considered filed until received. (App. at 20-21, 22-35.) The division received RFI's request for hearing after the thirty-day window provided by the notice provision contained within the cease and desist order. The division moved for dismissal of the pending hearing without prejudice. (App. at 22, 35.)

The assigned administrative law judge (ALJ) denied RFI's motion to dismiss, granted the division's cross motion to dismiss, and dismissed the hearing. (App. at 52-56.) RFI appealed both decisions to the commissioner, who affirmed the ALJ's decision in its entirety in a final order issued September 22, 2006. (App. at 61-65.)

RFI timely sought judicial review in front of the district court. (App. at

67.) The court reversed the commissioner's decision on the division's motion to dismiss, affirmed the commissioner's decision regarding RFI's motion to dismiss, and remanded the cause back to the division for a hearing on the merits. (*Id.* at 68-70.)

It is from the district court's ruling on judicial review that RFI timely appeals. (App. at 73-74.)

Statement of the Issue Presented for Review. The court must decide a single issue: whether the district court's affirmance of the commissioner's denial of RFI's motion to dismiss the cause with prejudice was appropriate. If the district court's determination on RFI's motion is correct, the cause should be remanded for a hearing in front of the commissioner on the merits of the underlying cease and desist order.

ROUTING STATEMENT

This case should be transferred to the court of appeals for resolution, as it raises questions resolvable under existing legal principles. Iowa R. App. P. 6.401(3)(b) (2007).

ARGUMENT

I. THE SPEEDY HEARING DUTY IMPOSED BY IOWA CODE SECTION 502.604(2) (2003) IS DESIGNED TO ASSURE ORDER AND PROMPTNESS IN ADMINISTRATIVE PROCEEDINGS UNDER CHAPTER 502, AND THUS IS NOT JURISDICTIONAL.

Standard of review. Iowa's appellate courts review a district court's

decision by applying the standards articulated by Iowa Code section 17A.19(10) in determining whether their conclusion is the same as that reached by the district court on the issue presented. *Ayers v. D & N Fence Co., Inc.*, 731 N.W.2d 11, 15 (Iowa 2007). RFI argues that the district court, in affirming the agency's action, applied Iowa Code section 502.604(2) incorrectly. Review of the instant question is thus governed by Iowa Code section 17A.19(10)(c). In making this determination, the court must comply with the requirements of Iowa Code section 17A.19(11)(c). RFI bears the burden of demonstrating the (1) required prejudice, and (2) invalidity of agency action. Iowa Code § 17A.19(8)(a).

Preservation of Error. RFI preserved error on its jurisdictional argument by raising it in front of the commissioner and the district court.

Reversal of the district court's affirmance of the commissioner's final order denying RFI's motion to dismiss is warranted only if the court determines that the duty imposed by Iowa Code section 502.604(2) deprives the division of jurisdiction once the time frame it expresses has expired. Section 502.604(2) relevantly provides:

> 2. *Summary process.* [A cease and desist] order under subsection 1 is effective on the date of issuance. Upon issuance of the order, the administrator shall promptly serve each person subject to the order with a copy of the order and a notice that the order has been entered. *The order must include . . . notice that, within fifteen days after receipt of a request in a record from the person, the matter will be scheduled for a hearing.*

Iowa Code § 502.604(2) (2003), as amended by 2004 Iowa Acts, ch. 1161, § 68

(emphasis added).

RFI argues the division's failure to transmit RFI's request for hearing to DIA within the fifteen-day time frame laid out in section 502.604(2) is mandatory and jurisdictional, requiring vacating the underlying cease and desist order and dismissing the administrative proceeding with prejudice. (App. at 17-18.)

The commissioner does not dispute that section 502.604(2) imposes a duty upon the division to timely transmit hearing requests to DIA. Nor does the commissioner dispute that the division completed its duty beyond the time frame provided by section 502.604(2). However, as the commissioner concluded and the district court affirmed, no authority supports RFI's assertion that the failure to immediately schedule the hearing deprives the division of jurisdiction. (App. at 68-70.)

Iowa case law establishes that section 502.604(2) is a discretionary statute imposing a duty designed to assure order and promptness in administrative hearings conducted under that provision. Section 502.604(2) is thus not jurisdictional. Absent a showing of prejudice by RFI in front of the commissioner and the district court, the underlying cease and desist order remains in effect.[2] The

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[2] RFI cannot now claim prejudice by the division's slight delay in transmitting the hearing request on the cease and desist order to DIA. RFI did not assert prejudice before the ALJ or in front of the commissioner on appeal to her from the ALJ's proposed decision. Even if RFI had preserved error, the delay was approximately ten days beyond the fifteen-day window provided by section 502.604(2). This period is consistent with—and much less onerous than—the timing discrepancies the post-*Taylor* Court has consistently held permissible under the directory statutes at issue in the reported cases. *See In re Sopoci*, 467 N.W.2d 799, 800 (Iowa 1991) (thirty-day statutory time frame for holding a hearing on a

administrative proceeding should go forward to a hearing on the merits as originally requested by RFI. The commissioner's denial of RFI's motion to dismiss was a correct application of the law and should—as the district court concluded—be affirmed.

The seminal modern case in this regard is *Taylor v. Department of Transportation*, 260 N.W.2d 521 (Iowa 1977). The facts in *Taylor* are very similar to those presented here. Taylor was a licensee who timely requested a hearing on the revocation of his license. The relevant statute contained a speedy-hearing provision, requiring the licensing agency to grant the requestor an opportunity to be heard within twenty days after receiving the request.

The agency scheduled the requested hearing for a date that was approximately three months beyond the twenty-day window. The licensee moved to dismiss the revocation proceeding, alleging (1) the statutory timing requirement was jurisdictional, depriving the agency of the authority to hold the hearing at a later date, and (2) the twelve-week scheduling delay was prejudicial. The hearing officer's denial of this motion was affirmed by the district court on judicial review.

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claim for return of property in forfeiture proceeding not jurisdictional but directory; failing to hold hearing within this time frame does not invalidate the underlying forfeiture proceeding); *McFee v. Iowa Dep't of Transp.*, 400 N.W.2d 578, 581 (Iowa 1987) (elapse of two-and-a-half years between arrest and final administrative disposition not inherently prejudicial, reversing district court's reversal of agency's license revocation); *Pietig v. Iowa Dep't of Transp.*, 385 N.W.2d 251, 253-54 (Iowa 1986) (agency's four-month delay in revoking licensee's license not prejudicial under directory statute requiring the agency to revoke the license "forthwith.").

The licensee repeated these assertions in his appeal before the Iowa Supreme Court. In affirming the district court's judicial review decision in favor of the agency, the Court stated that the critical issue in deciding the case was whether the statute imposing the twenty-day requirement was mandatory or directory:

> Mandatory and directory statutes each impose duties. The difference between them lies in the consequence for failure to perform the duty. . . . If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory and a violation will invalidate subsequent proceedings under it. *If the duty is not essential to accomplishing the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown.*

Taylor, 260 N.W.2d at 522-23 (emphasis added). The Court found that the speedy-hearing provision was

> clearly designed to provide order and promptness in the administrative process, the characteristic purpose of a directory statute.
>
> . . . .
>
> This construction is in accord with the general rule that statutory provisions fixing the time, form and mode of proceeding of public functionaries are directory because they are not of the essence of the thing to be done but are designed to secure system, uniformity and dispatch in public business. Such statutes direct the thing to be done at a particular time but do not prohibit it from being done later when the rights of interested persons are not injuriously affected by the delay.

Id. at 523 (citations omitted).

In the instant matter, the purpose of the Iowa uniform securities act, Iowa

Code chapter 502, is to regulate securities transactions in this state in a way promoting the public health, safety and welfare. Under *Taylor*, the speedy hearing requirement in section 502.604(2) is directory. The legislature intended that it assure order and promptness in carrying out the administrative process underpinning securities regulation: Those who sell securities improperly or without a license are promptly identified and sanctioned. Uncertainty for those against whom a statutory basis for sanction does not exist is soon eliminated.

RFI is not licensed to offer and sell securities in Iowa. RFI's products are not registered and are not exempt from registration.[3] The division's ability to assert regulatory authority over RFI is therefore limited to issuing the cease and desist order requesting a halt to certain acts the division believes either require a license or are prohibited by law. RFI will—as it originally requested—have the opportunity to rebut the division's allegations at a rescheduled hearing on the merits of the underlying cease and desist order. Permitting RFI to elude a hearing on the merits by reversing the district court's affirmance of the commissioner's

[3] RFI asserts in its brief at pages 9 and 10 that the commissioner is substantively bound on the licensing question by a district court securities finding in a proceeding in which the commissioner was not a party. It is well-settled that a stranger to litigation is not bound by it. *See, e.g., Harris v. Jones*, 471 N.W.2d 818, 820 (Iowa 1991) (a due process violation occurs when a litigant is bound by a judgment when that litigant was not a party to the action in which the judgment was rendered); *Edmundson v. Miley Trailer Co.*, 252 N.W.2d 415, 420 (Iowa 1977) (stating precedent that one who has not had an opportunity to litigate an issue is not bound by an adverse ruling in another suit and is entitled to his or her day in court); *Pfarr et al. v. Standard Oil Co.*, 157 N.W. 132, 133 (Iowa 1916) (unless a named party and bound to defend, one is a stranger to a proceeding and is not bound by any finding made therein). Consequently, the reviewing court should not consider any evidence submitted by RFI in this regard when deliberating upon the single issue presented by this appeal.

order would violate public policy by (1) elevating RFI's rights over those of the investing public, and (2) frustrating the legislature's intent that securities transactions be regulated for the protection of the public's health, safety and welfare. *See* Iowa Code § 502.608(2)(a) (the public interest is served by "maximizing effectiveness of regulation for the protection of investors").

The *Taylor* case and its progeny reasonably permit the conclusion that a late transmittal of a request for hearing, although not to be condoned, is allowed by section 502.604(2). As a matter of law the commissioner correctly affirmed the ALJ's denial of RFI's motion to dismiss, and the district court properly affirmed the commissioner.[4] The reviewing court should affirm the district court's decision on this issue and remand the cause to the commissioner with instructions to promptly reschedule a hearing on the merits of the underlying cease and desist order.

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[4] As already discussed, RFI moved not just for generic dismissal of the administrative hearing, but for vacation of the underlying cease and desist order and dismissal of the entire cause with prejudice. Generally, dismissal with prejudice is a harsh sanction tantamount to res judicata, and requires a substantial showing of harm to the requesting party. This is particularly true in cases such as this where procedural irregularity is asserted. *See, e.g., State v. Shank*, 296 N.W.2d 791, 794 (Iowa 1980) (reversing trial court ruling dismissing case with prejudice for State's failure to file minutes of evidence with trial information, concluding appropriate remedy was to "order done now what should have been done then.").

If the reviewing court determines that the commissioner should have granted RFI's motion to dismiss *without* prejudice, the appropriate remedy would be (1) reversal of the district court's decision, (2) vacation of the underlying cease and desist order, and (3) remand to the commissioner with instructions to dismiss the administrative proceeding without prejudice. This would permit the division to start over by issuing RFI a new cease and desist order.

CONCLUSION

For all of the reasons articulated above, the commissioner respectfully requests that the reviewing court (1) affirm the district court's denial of RFI's motion to dismiss, (2) assess costs on appeal to RFI, (3) remand the cause to the commissioner, with instructions to promptly reschedule a hearing on the merits of the contested cease and desist order as originally requested by RFI, and (4) award such further relief as the court deems appropriate.

REQUEST FOR ORAL ARGUMENT

The commissioner does not believe oral argument in this matter is necessary, as the decision appealed from raises no novel issues. However, if the court grants RFI oral argument, the commissioner, pursuant to Iowa rule of appellate procedure 6.21(1) (2007), respectfully requests to be heard in oral argument as well on the merits of the single issue raised in this appeal.

Respectfully submitted,

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IOWA STATE EDUCATION ASSOCIATION, Petitioner-Appellant, v. IOWA DEPARTMENT OF EDUCATION, Respondent-Appellee, and IOWA ASSOCIATION OF SCHOOL BOARDS AND SCHOOL ADMINISTRATORS OF IOWA, Interveners.	Case No. CV 8020 **RESPONDENT'S JUDICIAL REVIEW BRIEF**

COMES NOW the Iowa Department of Education (IDOE), through undersigned counsel, and for its Respondent's Brief in the above-captioned judicial review of its declaratory order states as follows:

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. THE 2009 TEACHER SALARY SUPPLEMENT (TSS) IS SUBJECT TO GOVERNOR CULVER'S ACROSS-THE-BOARD TEN PERCENT BUDGET CUT IMPOSED FOR FISCAL YEAR 2009-2010.

Authorities:

Iowa Assoc. of Sch. Bds. v. Iowa Dep't of Educ., 739 N.W.2d 303 (Iowa 2007)

Welden v. Ray, 229 N.W.2d 706 (Iowa 1975)

Iowa Code § 8.30 (2009)

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Iowa Code § 284.3A (Supp. 2009)

Iowa Code ch. 284 (2009)

2009 Iowa Acts, ch. 68, § 4, now codified as Iowa Code § 257.10(9)(d)

2009 Iowa Acts, ch. 183, § 60

Executive Order 19

Additional Resource:

2009 Aid and Levy Worksheet for Ankeny High School

STATEMENT OF THE CASE

Nature of the case. Is the Teacher Salary Supplement (TSS) appropriated by the Iowa legislature for fiscal year 2009-2010 subject to the Governor's ten percent across-the-board budget cut for that fiscal year, or is it a funding mandate protected from reduction?

Petitioner-Appellant Iowa State Education Association (ISEA) asked the Iowa Department of Education (IDOE) for a declaratory order on this question. IDOE declared that the TSS was subject to Executive Order 19 (EO 19), which directed that all appropriations be reduced by ten percent.

ISEA timely appeals from that order. Interveners Iowa Association of School Boards (IASB) and School Administrators of Iowa (SAI), who appeared and argued in front of IDOE, support IDOE's declaration that TSS funds are properly subject to the budget cut.

Statement of Facts and Course of Proceedings. The TSS at issue was created by the 2008 Iowa legislature and became available July 1, 2009. (Agency Certified Record at Tab 3, p. 207.) In September 2009, the Governor issued EO 19[1] which called for a

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[1] *See* www.governor.iowa.gov/files/Executive_Order_No19.pdf for the full text of Executive Order 19.

budget-wide uniform ten percent reduction in state spending. (Agency Certified Record at Tab 5, p. 2.) TSS funds were included in the reduction. (Agency Certified Record at Tab 3, p. 207.) Reduction efforts under EO 19 were to begin October 8, 2009. (Agency Certified Record at Tab 5, p. 2.)

ISEA challenged EO 19 by filing a petition for declaratory order with IDOE on or about October 27, 2009. (Agency Certified Record at Tab 3, p. 1.) ISEA argued that TSS funds should be exempt from the ten percent "haircut" of all state budget allocations. (Agency Certified Record at Tab 9, p. 2; Tab 6 at pp. 1-3.)

In an order dated December 4, 2009, IDOE Director Judy Jeffrey declared that "TSS funds are subject to the 10% across-the-board budget reduction." (Agency Certified Record at Tab 3, p. 212.)

ISEA has timely sought judicial review by this court of IDOE's declaratory order. (Agency Certified Record at Tab 2, p. 1.)

Statement of the Issue Presented for Judicial Review.

The single issue presented by this judicial review is exceedingly narrow: Is the money allocated to TSS by the 2009 Iowa legislature subject to EO 19's across-the-board ten percent budget cut imposed for fiscal year 2009-2010?

ARGUMENT

I. THE 2009 TEACHER SALARY SUPPLEMENT (TSS) IS SUBJECT TO GOVERNOR CULVER'S ACROSS-THE-BOARD TEN PERCENT BUDGET CUT IMPOSED FOR FISCAL YEAR 2009-2010.

Scope of Review. The court's review should be conducted under Iowa Code section 17A.19(11)(b) (2009). Under this section, the court should simply determine whether IDOE's interpretation of the statutes involved was "erroneous." *Iowa Assoc. Sch. Bds. v. Iowa Dep't of Educ.*, 739 N.W.2d 303, 306 (Iowa 2007); Iowa Code § 17A.19(10)(c) (2009).

IDOE agrees with ISEA that the only issue in this case is whether the legislature's 2009 TSS allocation is subject to Governor Culver's across-the-board ten percent budget reduction imposed for fiscal year 2009-2010. For the reasons discussed below, IDOE submits that its declaratory order stating that the TSS money is subject to the ten percent cut is correct. IDOE's decision therefore was a proper exercise of the agency's authority and should be affirmed by this court on judicial review.

A. The Governor's Budget Reduction Authority. When the Governor reduces state expenditures, the reduction must be uniform. The Governor's ability to uniformly reduce state

spending is created by Iowa Code sections 8.30 and 8.31(5). Section 8.30 explains when appropriated money becomes available for spending, and the circumstances under which the Governor can restrict or reduce availability:

> **8.30 Availability of appropriations.**
>
> *The appropriations made are not available for expenditure until allotted* as provided for in section 8.31. All appropriations are declared to be maximum and proportionate appropriations, the purpose being to make the appropriations payable in full in the amounts named if the estimate budget resources during the fiscal year for which the appropriations are made, are sufficient to pay all of the appropriations in full. *The governor shall restrict allotments* only *to prevent an overdraft or deficit in any fiscal year for which appropriations are made.*

Iowa Code § 8.30 (2009) (emphasis added).

Section 8.31(5) requires that any reductions by the Governor be uniformly applied:

> **8.31 Allotments of appropriations—exceptions—modifications.**
>
> . . . .
>
> 5. *If the governor determines* that the *estimated budget resources* during the fiscal year *are insufficient* to pay all appropriations in full, *the reduction shall be uniform and prorated between all departments, agencies and establishments upon the basis of their respective appropriations.*

Iowa Code § 8.31(5) (2009) (emphasis added).

Taken together, sections 8.30 and 8.31(5) permit the Governor to uniformly reduce appropriation allotments budget-wide when deficits are threatened.

B. <u>Iowa Department of Management's (IDOM) Role in Distributing Budgeted Funds</u>. IDOM is the state agency charged with making allotments under appropriations. IDOM's role in this regard is laid out by Iowa Code section 8.31(1)(b):

> **8.31 Allotments of appropriations—exceptions—modifications.**
>
> . . . .
>
> 1.b. *The director of the department of management shall approve the allotments subject to review by the governor, unless it is found that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, in which event such allotments may be modified to the extent the governor may deem necessary in order that there shall be no overdraft or deficit* in the several funds of the state at the end of the fiscal year, and *the director shall submit copies of the allotments thus approved or modified* to the head of the department or establishment concerned, who shall set up such allotments on the books and be governed accordingly in the control of expenditures.

Iowa Code § 8.31(1)(b) (2009) (emphasis added.) As the emphasized information shows, IDOM does not have budgeting authority apart from distributing allotments as approved or modified by the Governor. If the Governor decides to modify allocations downward

because of declining revenues, IDOM must accommodate his wishes and adjust accordingly. IDOM has no original authority to disburse state funds.

C. <u>What ISEA Argues</u>. The nub of ISEA's argument against the TSS ten percent cut is that the TSS fund is protected from the uniform application of EO 19 required by section 8.31(5). ISEA points to (1) the 2009 Aid and Levy Worksheet TSS calculations, (2) Iowa Code section 257.10(9)(d) as amended by 2009 Iowa Acts, chapter 68, section 4, and (3) 2009 Iowa Acts, chapter 183, section 60 to support its contention.

1. *The Aid and Levy Worksheet (Worksheet).* ISEA leads with the dollar value calculated by IDOM of the line item for TSS funds on the Worksheet, using the Ankeny Community School District Worksheet for 2009-2010 (Ankeny) as an example.[2] ISEA urges that "the amount calculated by the Department of Management for the TSS [must] be paid in full to Iowa public school teachers." (ISEA Brief at p. 5, ¶ 1, lines 6-7.) ISEA equates the Worksheet with a funding mandate.

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[2] The value of the TSS line item is found at lines 2.6 and 4.23 of the example provided and is calculated on a "cost per pupil" basis.

This argument is flawed on several bases. First, ISEA misunderstands the purpose of the Worksheet. The Worksheet is a form created by IDOM and distributed annually to local school districts by IDOM prior to the start of the new fiscal year.[3] It is at some point provided to the local districts in final form.

IDOM fills in certain calculations required by statutory formulas prior to sending the Worksheet to districts. The form as provided allows each district to calculate its total spending authority and property tax under the school finance formula. When complete, the Worksheet provides the boundaries or upper limits for total school district spending during a fiscal year. In other words, the Worksheet is a worksheet.

In practice the Worksheet TSS calculation for Ankeny works this way: Ankeny's upper spending limit for TSS for 2009-2010 is $445.75 per pupil. If actual state revenues had been sufficient, the State could have allocated Ankeny the full $445.75 per pupil in state funds for TSS distribution, but no more.

Because actual state revenues were substantially less, EO 19 requires a ten percent reduction of the state funds available to

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3 The upper right-hand corner of the sample Worksheet shows it was created by IDOM on June 6, 2009.

distribute to Ankeny for TSS purposes. Ankeny will now receive $401.18 per pupil for TSS under the ten percent budget reduction ($445.75 - $44.57 = $401.18).

Whether Ankeny must find a way to spend up to the $445.75 maximum per pupil in TSS distributions is not mandated by IDOM's mere calculation of the maximum per pupil cost for TSS. As IDOE noted, the answer to this question lies in "the locally bargained agreements of each school district." IDOE 12/04/09 Declaratory Order (Agency Certified Record at Tab 3, p. 212, ¶ 1, lines 4-5.) If the local teacher contracts require Ankeny to make up some or all of the ten percent gap of $44.57 per pupil, it must do so using local funds—spending cash reserves, borrowing funds, increasing property taxes, or some combination of these. All school districts would go through the same analysis as described here to determine whether—and if required, to what extent—local funds would be necessary to close the spending gap created by EO 19.

Second, at the time IDOM initially prepares line items on the Worksheet, it has no idea whether state revenues for the upcoming fiscal year will be increasing, decreasing, or stable. It does know what the legislature has appropriated as the upper limits on spending,

because it completes these forms after the end of the legislative session.

The figures IDOM provides districts on the Worksheet only make sense as the upper limits of a district's spending authority for each line item calculated, regardless of the level at which revenues ultimately come in. Districts need to know their upper spending limits as close to the start of a fiscal year as possible, because if state revenue projections fall short in reality, management must find ways to cover the cost of any promises made in collective bargaining that create a gap between the amount of money the state can provide and the ultimate price of each promise.

Finally, suggesting that IDOM has independent ability to create a funding mandate through providing districts with TSS Worksheet calculations flies in the face of the Governor's budgeting authority vis-à-vis state agencies. The Governor has the final word.

As section 8.31(1)(b) makes clear, the Governor can modify any allotments made by IDOM if he deems it necessary to avoid a budget shortfall. The mere fact that IDOM provides school districts with calculations based upon initial allotment projections (later modified by the Governor through EO 19) does not create any kind of funding obligation, as IDOE concluded. Nor is it an appropriation or an

allocation. Rather, it sets the maximum amount of money each district can expend per pupil for TSS in a fiscal year, regardless of the ultimate source(s) of that funding:

> We agree with ISEA's statement that there is no authority for a school district to alter the amount of TSS calculated on the Aid and Levy Worksheet. The calculation is by statutory formula, and the resulting calculation sets the upper limit of the school district's spending authority. But we disagree with ISEA's contention that school districts are mandated by statute to make payment to their teachers of the sum calculated.

IDOE 12/04/09 Declaratory Order (Agency Certified Record at Tab 3, p. 211, ¶ 2.)

2. *Iowa Code Section 257.10(9)(d).* ISEA backfills its argument that the Worksheet TSS calculation is a fixed funding mandate with its interpretation of Iowa Code section 257.10(9)(d)'s reference to "calculations". As amended in the 2009 legislative session, section 257.10(9)(d) now provides:

> d. For the budget year beginning July 1, 2009, *the use of the funds calculated under this subsection shall comply with the requirements of chapter 284*[4] and shall be distributed to teachers pursuant to section 284.3A.[5] For the budget year beginning July 1, 2010, and succeeding budget years, *the use of the funds calculated under this subsection shall comply with the requirements of chapter*

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4 Chapter 284 contains standards for teacher performance, compensation, and career development.

5 Section 284.3A lists the various ways a school district may disburse TSS funds to qualified teachers.

284 and shall be distributed to teachers pursuant to section 284.3A.

2009 Iowa Acts, ch. 68, § 4 (emphasis added), now codified as Iowa Code § 257.10(9)(d).

ISEA believes the emphasized language evidences a legislative intent to distribute the calculated amounts of TSS funds listed on the Worksheet to each school district without reduction despite what EO 19 clearly requires.. ISEA transforms the actual language of section 257.10(9)(d)—"the use of funds calculated under this subsection"—into a requirement that TSS funds "be paid as 'calculated' by the Iowa Department of Management." (ISEA Brief at p. 7, ¶ 2, lines 1-2.)

A reasonable reading of section 257.10(9)(d) yields the conclusion that it is not a funding mandate, spending mandate, or appropriation provision. The emphasized phrases are a limitation on spending. They simply require that any funds districts receive for TSS be spent only for TSS after applying chapter 284 standards and complying with section 284.3A disbursement requirements. Nothing more is stated or suggested.

In rejecting ISEA's argument as an unreasonable interpretation of amended section 257.10(9)(d), IDOE wisely observed:

Certainly it is true that the full amount of money *appropriated and allocated* to school districts for TSS

> must be applied as directed by the Legislature, but we are unwilling to make the leap required by ISEA to say that any statute mandates that a school district distribute to teachers *funds calculated but not allocated to the school district.* We believe the ISEA overemphasizes the word "calculated" in 257.10(9)(d). The verb "calculated" is modified by the phrase "use of" those funds. *We believe the plain meaning of the statute is to express the concern of our Legislature with making sure that the distributed funds are used appropriately; the statute is not mandating that funds calculated be distributed.*
>
> . . . .
>
> When we view the phrase "as calculated," we believe that it harmonizes with the total school finance scheme best to interpret the phrase as *a cap on spending and a directive to use TSS funds for the purposes allowed in chapter 284.* To adopt ISEA's interpretation does too much harm--$30 million of harm—to direct student programs for this agency to believe that holding TSS funds harmless is the intent of the Iowa Legislature. The 10% across-the-board budget reduction imposes a great burden on our school districts and their students. That burden would be unduly and disproportionately placed on the backs of Iowa's K-12 students if this agency were to answer the questions as ISEA has proposed.

IDOE 12/04/09 Declaratory Order (Agency Certified Record at Tab 3, p. 211, ¶¶s 3, 5.) (emphasis added.)

3. *2009 Iowa Acts, Chapter 183, Section 60.* As further support for its belief that TSS amounts as calculated for each district by IDOM is insulated from EO 19, ISEA cites 2009 Iowa Acts, chapter 183, section 60. This is the overall appropriation of state

foundation aid for public schools, which in 2009-2010 drew upon both state revenue and one-time federal recovery funds. It provides:

> Sec. 60. STATE FOUNDATION AID FOR SCHOOLS – FY 2009-2010. Notwithstanding the standing appropriation in section 257.16, subsection 1, for state foundation aid for the fiscal year beginning July 1, 2009, and ending June 30, 2010, the amount appropriated from the general fund of the state pursuant to that section for the following designated purpose shall not exceed the following amount:
>
> For state foundation aid under section 257.16, subsection 1:.....$2,587,500,000
>
> 1. *Of the amount designated in this section for state foundation aid, $309,001,736 is allocated* for teacher salary supplements, the professional development supplements, and the early intervention supplement *in accordance with section 257.10, subsections 9 through 11, and section 257.37A.*
>
> 2. If the remaining balance of the moneys designated in this section, after the allocation made in subsection 1, is less than the amount required to pay the remainder of state foundation aid pursuant to section 257.16, subsection 1, the difference shall be deducted from the payments to each school district and area education agency in the manner provided in section 257.16, subsection 4.[6] The reduction for area education agencies shall be added to the reduction made pursuant to section

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[6] Section 257.16(4) states:

> *Notwithstanding any provision to the contrary, if the governor orders budget reductions in accordance with section 8.31, reductions in the appropriations provided in accordance with this section* shall be distributed on a per pupil basis calculated with the weighted enrollment determined in accordance with section 257.6, subsection 5.

Iowa Code § 257.16(4) (2009) (emphasis added).

> 257.35, subsection 5, as amended by this division of this Act.

2009 Iowa Acts, ch. 183, § 60 (emphasis added).

ISEA argues that the plain language of paragraph 2 of this provision segregates and insulates TSS allocations from reduction by the Governor. IDOE rejected this argument for the same reason it rejected the argument under amended section 257.10(9)(d):

> As for § 60 of 2009 Acts, HF 820, this agency believes that *the Legislature meant only to hold TSS payments harmless in the absence of an across-the-board budget reduction. The appropriation and subappropriation at section 60 are the maximums to be initially disbursed to the Department of Management.* We do not believe that paragraph 2 intended to do anything more than to direct the Department of Management to disburse TSS funds first, if there is no across-the-board budget reduction [the reference to 257.16(4)].

IDOE 12/04/09 Declaratory Order (Certified Agency Record Tab 3 at p. 211, ¶ 7.) (emphasis added; emphasis in original underscored.)

IDOE's conclusion is consistent with the emphasized portion of section 257.16(4), which contemplates that if the Governor cuts the budget, appropriations provided under section 257.16(4) requirements must be uniformly reduced "notwithstanding any provision to the contrary," and distributed on a per pupil basis. *Id.* Through this phrase the legislature recognizes that, even where specific funding may be intended, it appropriately takes a back seat to

a gubernatorial across-the-board budget cut when the state treasury is imperiled.

IDOE's conclusion is also consistent with the Iowa Supreme Court's analyses of statutory provisions under item veto cases. In *Weldon v. Ray, 229 N.W.2d 706, 714-15,* (Iowa 1975), the Court discussed with approval the Brady rule, which prohibits a lump-sum appropriation followed by subdivisions calling for the expenditure of the lump sum in specified amounts for named purposes.

Although the *Welden* Court was not presented with appropriation acts running afoul of the Brady rule, it nevertheless approved of it as a check on legislative attempts to end-run a governor's item-veto authority:

> The legislative device of a lump-sum appropriation with subdivisions [calling for the expenditure of the lump sum in specified amounts for named purposes] unconstitutionally invades the item-veto authority of a governor, just as the gubernatorial device of a veto of a qualification on an appropriation unconstitutionally invades the lawmaking authority of a legislature.

Welden, 229 N.W.2d at 714.[7]

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7 ISEA must believe the language of 2009 Iowa Acts, chapter 183, section 60 is problematic, as it has offered legislation during the 2010 session which attempts to exempt TSS funds from gubernatorial across-the-board budget cuts in the future.

Under a thoughtful review, 2009 Iowa Acts, chapter 183, section 60 looks like a lump-sum appropriation ($2,587,500,000) followed by subdivision 1 calling for the expenditure of the lump-sum in a specified amount ($309,001,736) for named purposes (TSS, professional development supplements, and the early intervention supplement). If the Governor could permissibly item-veto subdivision 1 of 2009 Iowa Acts, chapter 183, section 60 entirely, it is certainly rational that he can reduce the appropriation for that subdivision for all purposes by ten percent as part of his necessary across-the-board reduction in spending.[8] IDOE's declaratory order coming to the same conclusion is reasonable.

CONCLUSION

IDOE logically concluded that one consistent theme runs through the Worksheet TSS line item, the 2009 amendment to section 257.10(9)(d), and 2009 Acts, chapter 183, section 60: The relevant provisions are all clauses of limitation, stating the ceiling above which a school district cannot spend. None of them insulate appropriations or allocations of funds or obligate a disbursement outside of EO 19 uniform spending reduction requirements.

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[8] ISEA does not challenge the ten percent reduction for the professional development supplements or the early intervention supplement.

Individually or collectively, they do not mandate that TSS funds be exempted from the uniform application of the Governor's ten percent budget cut.

IDOE's declaratory order was a reasonable rather than erroneous interpretation of 2009 Iowa Acts, chapter 68, section 4, now codified as Iowa Code section 257.10(9)(d) and 2009 Iowa Acts, chapter 183, section 60. As IDOE observed, to interpret these provisions in the fashion ISEA requests would work an unreasonable and very significant hardship on local school districts that the legislature could not have contemplated and did not intend.

For all of the reasons articulated herein, IDOE respectfully requests that the Court (1) affirm in its entirety IDOE's final declaratory order concluding that the TSS is subject to Governor Culver's ten percent across-the-board budget cut for fiscal year 2009-2010, (2) assess costs of this judicial review to ISEA, and (3) award such further relief as the Court deems appropriate.

Respectfully submitted,

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Proof of Service

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on 19th day of March, 2010.

_X_ U.S. Mail	___FAX
___ Hand Delivery	___Overnight Courier
___ Federal Express	___Other
___ Electronically	

Signature:_____